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No. 347

In the Supreme Court of the United States

OCTOBER TERM, 1961

FINE FASHIONS, INC., PETITIONER

v.

CHRIS L. GROSS, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT GROSS AND THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The findings of fact, conclusions of law, and opinion of the District Court (R. 19a–26a; Pet. App. 21–23) [1] are not officially reported. The opinion of the Court of Appeals (Pet. App. 1–19) is reported at 290 F. 2d 871.

JURISDICTION

The judgment of the Court of Appeals was entered on June 1, 1961. (Pet. App. 25.) The petition for a writ of certiorari was filed on August 23, 1961.

[1] Record references are to the appendix to the petitioner's brief filed in the Court of Appeals.

The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the courts below correctly found that the delinquent taxpayer rather than the petitioner was the owner of certain personal property which was seized under a levy and distraint in order to satisfy the Government's lien for unpaid taxes under Section 6321 of the Internal Revenue Code of 1954.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):

> SEC. 6321. LIEN FOR TAXES.
>
> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.
>
> * * * * *
>
> SEC. 6331. LEVY AND DISTRAINT.
>
> (a) *Authority of Secretary or Delegate.*
>
> If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except

such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. * * *

(b) *Seizure and Sale of Property.*—The term "levy" as used in this title includes the power of distraint and seizure by any means. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

* * * * *

STATEMENT

This is an action brought by the petitioner to enjoin the sale of certain personal property and to quash a warrant of distraint pursuant to which that property was to be sold in order to satisfy a tax lien in favor of the United States. The ground for the action was the allegation that the property seized belonged to the petitioner rather than to the delinquent taxpayer (Penn Garment Company). The facts may be summarized as follows:

Penn Garment Company, a manufacturer of women's apparel, is a corporation owned and controlled by Louis Wolfe and his family. The petitioner is also engaged in the same line of business and some of its manufacturing is done by independent contractors; Penn and other Wolfe enterprises were among those who, in the past, had performed such independent contracting. (R. 22a; Pet. App. 2.)

On April 12, 1957, Penn obtained a contract with the Philadelphia Quartermaster Depot to supply

24,321 Air Force nurses' uniforms, to be made from blue chambray cloth, for a total price of $104,555.98. It sought to obtain the required cloth from Reeves Brothers, Incorporated, textile manufacturers, but Reeves would not sell on Penn's credit alone. (R. 22a, 23a, 25a.) When informed of Penn's troubles the petitioner agreed, as an accommodation, to help Penn obtain the required materials. (R. 23a.)

On July 1, 1957, Penn entered into a factoring agreement with Linde Factors Corporation whereby all monies due or to become due under the Quartermaster Depot contract were assigned to Linde. On July 2, 1957, there was a conference at the office of Linde attended by representatives of Penn and Linde, and by Henry Mayersohn as attorney for the petitioner. As a result of this conference a letter from Linde, approved by Penn, was given to the petitioner's attorney. The letter stated that the purchase from Reeves had been guaranteed by the petitioner and that in order to pay for the cloth Linde would withhold from Penn all monies received under the assignment of the proceeds of the Quartermaster Depot contract unless authorized to the contrary by the petitioner's accountant. (R. 12a, 23a–24a; Pet. App. 3.) The cloth was then ordered from Reeves by the petitioner and sent directly to Penn. As completed uniforms were delivered to the Quartermaster payment therefor was made to Linde, which in turn disbursed the sum of $8,979.70 to the petitioner and the sum of $25,433.75 to Penn, pursuant to the letter of July 2, 1957. Payment for the cloth was made to Reeves by the petitioner. (R. 24a.)

On April 1, 1958, the Internal Revenue Service, under Sections 6321 and 6331 of the Internal Revenue Code of 1954, *supra*, made a levy and distraint upon several lots of the blue chambray cloth and completed and partially completed nurses' uniforms located in Penn's plants, for the purpose of satisfying a lien for taxes owing by Penn to the United States. (R. 24a–25a). The District Court found that the property belonged to Penn and was properly seized. (R. 25a.) The Court of Appeals, one judge dissenting, affirmed. (Pet. App. 1–19, 25.)

ARGUMENT

The finding of both courts below that Penn owned the blue chambray cloth here claimed by the petitioner was a resolution of a question of fact which is amply supported by the evidence. There is no occasion for further review by this Court.

The letter of July 2, 1957, from Linde to petitioner, which resulted from a conference between representatives of Penn and Linde and the petitioner's attorney, provided that the petitioner's role in the purchase of the cloth should be merely that of a guarantor for the payment of Reeves' bill. Penn bore the primary responsibility for the cost of the cloth which was to be met through its assignment to Linde of the proceeds of the Quartermaster Depot contract.[2]

[2] The petitioner theorizes (Pet. 9–11) that Penn's assignment to Linde caused Penn to become a trustee of the cloth or, in any event, made the cloth unavailable for federal tax liens. Both of these arguments were previously made and were answered to the satisfaction of the courts below. None of the cases cited by the petitioner support its contentions. The petitioner also here argues (Pet. 11) for the first time that it

The subsequent conduct of the parties confirms that the intention of the parties was as set forth in the letter and that the arrangement there provided was the only protection desired by the petitioner. Thus, the evidence reveals that the cloth was ordered by the petitioner only after the letter had been received and approved by its attorney and upon his advice to proceed with the accommodation; that the petitioner provided for unrestricted delivery of the cloth by Reeves to Penn; that after Reeves made delivery the petitioner never bothered to inspect the cloth or the uniforms which were being made from it; that Penn at all times material exercised full dominion and control over the material and made deliveries of completed uniforms in its own right and without ever consulting the petitioner and without its permission; and, finally, that the proceeds of the Quartermaster Depot contract were disbursed to the parties in accordance with the letter agreement. The evidence, therefore, fully warrants the District Court's conclusion, approved by the Court of Appeals, that the true intention of the parties was that the petitioner would pledge its credit rating to guarantee payment for the cloth and that title thereto would vest in Penn. There is no basis for disturbing the concurrent findings of the lower courts.

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became the purchaser of the cloth as the result of Penn's assignment. This argument, however, is likewise patently erroneous.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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